

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of Applications of	)	
	)	
MDS DIGITAL NETWORK, INC.	)	
	)	
For Renewal of License of Multipoint	)	File No. BRMD-20010330AHW
Distribution Service Station WPY40, Los	)	
Angeles, California	)	
	)	
For Renewal of License of Multipoint	)	File No. BRMD-20010330ADO
Distribution Service Station KFI79, Los	)	
Angeles, California	)	
	)	
For Renewal of License of Multipoint	)	File No. BRMD-20010330AHV
Distribution Service Station KFF79, Los	)	
Angeles, California	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 14, 2003**

**Released: November 17, 2003**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order*, we address a Petition to Deny and Petition for Declaration of License Forfeiture<sup>1</sup> filed by Southern Wireless Video, Inc. (Southern) against MDS Digital Network, Inc. (MDS Digital). For the reasons stated below, we grant the Petition and declare that MDS Digital forfeited the licenses for Stations WPY40, KFI79, and KFF79, Los Angeles, California as of June 24, 2000. We also dismiss the applications for renewal of the licenses of those stations filed by MDS Digital on March 30, 2001.

2. *Background.* MDS Digital has held the licenses for Stations WPY40, KFI79, and KFF79 since December 3, 1999, when the licenses were assigned from Earl S. Kim to MDS Digital.<sup>2</sup> Mr. Kim had held the licenses since November 23, 1990, upon their transfer to him by Worldcom Broadband Solutions II.

<sup>1</sup> Petition to Deny and Petition for Declaration of License Forfeiture (filed Aug. 1, 2000 (Petition)).

<sup>2</sup> See *Notice of Consummation* (filed Dec. 9, 1999).

3. Mr. Kim and, subsequently, MDS Digital, have filed annual reports for most years since 1995.<sup>3</sup> These annual reports demonstrate that Station WPY40 has never provided service, and has operated only in test mode for a total of 824 hours over the reported years.<sup>4</sup> Similarly, the annual reports show that since 1997, Station KFI79 has not provided any service, and has operated only in test mode for a total of 752 hours.<sup>5</sup> In the case of Station KFF79, the annual reports reveal that while in 1997 the station provided 8,088 hours of entertainment programming to 1,571 subscribers,<sup>6</sup> since 1998 Station KFF79 has operated for only 2,222 hours, and only in test mode since 1999.

4. In the annual reports filed for 1996, Mr. Kim claimed that he was attempting to arrange a fiber optic link for Stations WPY40 and KFI79.<sup>7</sup> In the 1997 annual reports, Mr. Kim stated his expectation that such a link would be installed by May 1, 1998.<sup>8</sup> However, in the 1998 annual reports, Mr. Kim stated that he was unable to obtain the link.<sup>9</sup> Mr. Kim stated that he intended to reconfigure the system. However, in the subsequent annual reports, MDS Digital has reported that none of the three stations have been able to provide service due to circumstances arising from an ancillary bankruptcy proceeding.

5. On March 30, 2001, MDS Digital filed applications for renewal of the licenses for Stations WPY40, KFI79, and KFF79.<sup>10</sup> On August 1, 2001, Southern filed petitions to deny the pending renewal applications.<sup>11</sup> Southern is the Basic Trading Area authorization holder for Los Angeles, California (B262).

6. *Discussion.* Southern alleges in its Petition that MDS Digital's licenses for Stations WPY40, KFI79, and KFF79 automatically cancelled pursuant to Sections 21.44(a)(3) and 21.303(d) of the Commission's Rules because MDS Digital voluntarily removed or altered its facilities so as to render the stations not operational for a period of thirty days or more.<sup>12</sup> In support of its arguments, Southern provides declarations from its technicians stating that on June 29, and July 20, 25, and 27, 2001 they inspected and monitored MDS Digital's transmitter site and determined that the stations were not

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<sup>3</sup> See 47 C.F.R. § 21.911(a)(3) which requires MDS licensees to file annual reports for each station listing, *inter alia*, the number of subscribers and the total hours of transmission service rendered during the calendar year in the following categories: entertainment, education and training, public service, data transmission, and other services; see also Earl S. Kim Annual Reports for Calendar Years 1994 through 1998 (filed Mar. 1, 1996; Mar. 12, 1997; Mar. 11, 1998; July 12, 1999); MDS Digital Network, Inc. Annual Reports for Calendar Years 1999, 2001, and 2002 (filed Mar. 29, 2000; Mar. 1, 2002; Feb. 28, 2003) (Annual Reports). The Commission's files do not reflect that MDS Digital filed annual reports for the year 2000.

<sup>4</sup> See Annual Reports.

<sup>5</sup> *Id.*

<sup>6</sup> See Earl S. Kim Annual Report for Calendar Year 1997 (filed Mar. 11, 1998).

<sup>7</sup> Annual Reports (filed Mar. 12, 1997).

<sup>8</sup> Annual Reports (filed Mar. 11, 1998).

<sup>9</sup> Annual Reports (filed Jul. 12, 1999).

<sup>10</sup> Application FCC File Nos. BRMD-20010330AHW, BRMD-20010330ADO, and BRMD-20010330AHV (filed Mar. 30, 2001).

<sup>11</sup> See Petition to Deny and Petition for Declaration of License Forfeiture filed by Southern Wireless Video, Inc. (filed Aug. 1, 2001). MDS Digital has not opposed Southern's petition, but has filed numerous consent motions for extension of time to file. MDS Digital filed its most recent such consent motion on September 6, 2002, for an extension of time until December 6, 2002.

<sup>12</sup> Petition at 2; see also 47 C.F.R. §§21.44(a)(3) and 21.303(d).

operating, and that the transmitters were either disconnected or were in standby mode.<sup>13</sup> In addition, Southern appends surveys independently performed on the three stations in 1999, which also show the stations not to have been operational on numerous dates from January 27, 1999 through June 24, 1999.<sup>14</sup>

7. Based on the record before us, we conclude that we need not address whether MDS Digital's licenses forfeited automatically pursuant to Section 21.44(a)(3) of the Commission's Rules,<sup>15</sup> as Southern alleges.<sup>16</sup> Rather, we find that this issue need not be addressed since the record clearly establishes that MDS Digital permanently discontinued operation of Stations WPY40, KFI79, and KFF79.<sup>17</sup> As a result, pursuant to Section 21.303(d) of the Commission's Rules, the circumstances presented require a determination of cancellation of the licenses for Stations WPY40, KFI79, and KFF79.<sup>18</sup> Section 21.303(d) states, in pertinent part:

If any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed . . . the licensee shall, within thirty days of the end of such period of nonuse: (1) Submit for cancellation the station license . . . (2) File an application for modification of the license (or licenses) to delete the unused frequency (or frequencies), or (3) Request waiver of this rule and demonstrate either that the frequency will be used . . . within six months of the end of the initial period of nonuse, or that the frequency will be converted to allow rendition of other authorized public services within one year of the end of the initial period of nonuse . . . .<sup>19</sup>

MDS Digital's annual reports, as well as Southern's submissions in this proceeding, establish that neither Mr. Kim nor MDS Digital have used Stations WPY40 and KFI79 to render any service since the stations were acquired, nor have Mr. Kim or MDS Digital used Station KFF79 to render any service since early in 1999.<sup>20</sup> Section 21.303(d) was designed to ensure that "a carrier who has a license, but is unable to use it . . . relinquish[es] the frequencies to others who may be able to use the spectrum."<sup>21</sup> This rule requires a licensee to provide service.<sup>22</sup> Therefore, we find that, under the circumstances of this case, pursuant to Section 21.303(d) of the Commission's Rules,<sup>23</sup> the licenses for Stations WPY40, KFI79, and KFF79 cancelled as of June 24, 2000, the ending date of the twelve-month period following demonstration by the evidence before us of non-service by the stations.<sup>24</sup> In light of our conclusion that the licenses for

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<sup>13</sup> Petition, Exhibits A, B, and C.

<sup>14</sup> Petition, Exhibit D.

<sup>15</sup> 47 C.F.R. § 21.44(a)(3).

<sup>16</sup> See Petition.

<sup>17</sup> See Annual Reports.

<sup>18</sup> 47 C.F.R. § 21.303(d).

<sup>19</sup> *Id.*

<sup>20</sup> See Annual Reports, *supra*.

<sup>21</sup> See Revision of Part 21 of the Commission's Rules, CC Docket No. 86-128, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ 81 (1987).

<sup>22</sup> See San Diego MDS Company, *Order on Reconsideration*, DA 03-3619 (WTB PSPWD rel. Nov. 13, 2003); Warren Ache, *Memorandum Opinion and Order*, 9 FCC Rcd 2464, 2466 (1993) (*Warren Ache*).

<sup>23</sup> 47 C.F.R. § 21.303(d).

<sup>24</sup> We note that MDS Digital failed in its obligation to submit its license for cancellation pursuant to 47 C.F.R. § 21.303(d). Any alternative reading of the rule that would require the submission of the license as a condition

Stations WPY40, KFI79, and KFF79 have forfeited, we will dismiss MDS Digital's applications for renewal of license for those stations.

9. For the reasons stated above, we conclude that MDS Digital forfeited its licenses by failing to use those licenses to provide service for a period of at least twelve consecutive months. In light of our conclusion, we will dismiss the renewal applications filed by MDS Digital.

10. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.303 of the Commission's Rules, 47 C.F.R. § 21.303, that the petition to deny filed by Southern Wireless Video, Inc., on August 1, 2001 in connection with Stations WPY40, KFI79, and KFF79 IS GRANTED.

11. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.303 of the Commission's Rules, 47 C.F.R. § 21.303, that the licenses for Stations WPY40, KFI79, and KFF79 ARE DEEMED FORFEITED.

12. IT IS FURTHER ORDERED that the applications for renewal of license filed by MDS Digital Network, Inc. (File Nos. BRMD-20010330AHW, BRMD-20010330ADO, and BRMD-20010330AHV) on March 30, 2001 ARE DISMISSED.

13. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

#### FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry  
Chief, Public Safety and Private Wireless Division  
Wireless Telecommunications Bureau

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precedent to cancellation would be an unreasonable reading, as it would frustrate the underlying purpose of the rule. The rule was adopted to ensure the efficient use of the spectrum by requiring the cancellation of used licenses. *See* Revision of Part 21 of the Commission's Rules, *Report and Order*, 2 FCC Rcd 5713, 5724 ¶ 82 (1987).